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## Secrecy, Guilt by Association, and the Terrorist Profile

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### Secrecy, Guilt by Association, and the Terrorist Profile

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## SECRECY, GUILT BY ASSOCIATION, AND THE TERRORIST PROFILE

David Cole<sup>†</sup>

In March 1998, Hany Kiareldeen, a 30-year old Palestinian immigrant living in New Jersey, was arrested by United States immigration authorities and imprisoned. Government officials told him that his presence in the United States threatened national security. When Kiareldeen asked why, he was told that the evidence that supported the charge was secret, and could not be revealed to him because its disclosure would imperil national security. Kiareldeen spent 19 months in prison without seeing the evidence that placed him there, until a federal judge ruled in October 1999 that his detention was unconstitutional and ordered his release.<sup>1</sup> The government's principal source appears to have been Kiareldeen's ex-wife, with whom he was in a custody dispute over their child. He offered un rebutted testimony that she had made numerous false allegations against him in the course of the dispute, all of which had been dismissed by local officials. But one allegation, that he was associated with terrorists, was passed on to the FBI, and that allegation landed him in jail on secret evidence for over 19 months.<sup>2</sup>

Today Hany Kiareldeen is a free man. But U.S. immigration authorities continue to assert the authority to use secret evidence to lock up immigrants in deportation proceedings, to exclude aliens at the border, and to oppose applications for "relief from deportation," including asylum.<sup>3</sup> In most such cases, the charges against the alien are

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1. *Kiareldeen v. Reno*, 71 F.Supp.2d 402 (D.N.J. 1999). The account of Kiareldeen's case in the text is supported by the district court decision, as well as by the decisions of the Immigration Judge and the Board of Immigration Appeals. See *Matter of Kiareldeen*, No. A77-025-332 (U.S. Immgr. Ct. Apr. 2, 1999) (Dec. of Immgr. J.); *Matter of Kiareldeen*, No. A77-025-332 (BIA June 29, 1999) (Moscato, J., dissenting to Dec. Denying Request to Lift Stay of Release Order); *Matter of Kiareldeen*, No. A77-025-332 (BIA Oct. 15, 1999) (Dec. on Deportation App.).

2. *Matter of Kiareldeen*, No. A77-025-332, slip op. at 9 (U.S. Immgr. Ct. Apr. 2, 1999) (Dec. of Immgr. J.).

3. See, e.g. Testimony of Larry Parkinson, Deputy General Counsel, FBI, before H.R. Subcomm. on Immgr. of the Jud. Comm., *The Secret Evidence Repeal Act, Hearings on H.R. 2121*, 106<sup>th</sup> Cong. 18, 22 (Feb. 10, 2000); Testimony of Bo Cooper, General Counsel, INS before H.R. Subcomm. on Immgr. Of the Jud. Comm., *The Secret Evidence Repeal Act, Hearings on*

not that he engaged in any terrorist or criminal activity, but merely that he is *associated* with terrorists or a terrorist group. The practice of relying on secret evidence and guilt by association in immigration proceedings is not new;<sup>4</sup> but the Immigration and Naturalization Service (INS) used these tactics more aggressively in the late 1990s, in part because in 1996 Congress expanded its authority to do so in two statutes—the Antiterrorism and Effective Death Penalty Act,<sup>5</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act.<sup>6</sup>

For the last decade, virtually all of the INS's targets for these tactics—secret evidence and guilt by association—have been Arabs or Muslims. While there is no hard evidence that this targeting is motivated by animus against Arabs and Muslims, it does appear likely that it is driven at least in part by ignorance about the Arab and Muslim world, and by the prevalence of stereotypes linking terrorism and an Arab or Muslim face. The stereotypes make it less costly for the government to invoke these tactics, because the general public is less likely to object when the “victim” is one whom they already associate with terrorism. The stereotype may also make government agents more suspicious of political activism by Arabs and Muslims than of others' activism. Most troubling, the tactics of guilt by association and secret procedures reinforce and perpetuate the very stereotypes and ignorance about Arabs and Muslims that appear to underlie many of these cases. Secret procedures permit assertions and assumptions to go untested and unexamined, while guilt by association indulges the very kind of group-based thinking that is the essence of prejudice.

I have a personal stake in this issue. Since 1987, I have represented thirteen aliens against whom the INS has sought to use secret evidence, including Hany Kiareldeen.<sup>7</sup> At one time, the INS

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H.R. 2121, 106<sup>th</sup> Cong. 19, 20-21 (May 23, 2000). The government also continues to argue in the courts that it has the authority to use secret evidence in immigration proceedings. See e.g. Respts/Appellants' Br. 17, *Al-Najjar v. Ashcroft*, No. 00-14947-B (pending 11<sup>th</sup> Cir. 2001).

4. See *Jay v. Boyd*, 351 U.S. 345 (1956) (upholding use of secret evidence to deny suspension of deportation against statutory challenge); *Galvan v. Press*, 347 U.S. 522 (1954) (upholding deportation based on Communist Party membership); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (striking down use of secret evidence on regulatory construction grounds because of constitutional due process concerns presented by practice); *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (upholding use of secret evidence to exclude entering alien on ground that aliens outside United States have no constitutional rights).

5. Pub.L.No. 104-132, 110 Stat. 1214-1319.

6. Pub.L.No. 104-208, Div. C, 110 Stat. 3009, 3546-3724.

7. The others are Fouad Rafeedie, Aiad Barakat, Khader Hamide, Michel Shehadeh, Naim Sharif, Ayman Obeid, Amjad Obeid, Julie Mungai, Basher Amer, Nasser Ahmed, Imad Hamad, and Mazen Al Najjar. See case citations in footnotes to text discussing these cases *infra*. I have had many able co-counsel in these proceedings, including Nancy Chang of the Center for

claimed that all thirteen posed a threat to the security of the nation, and that the evidence to support that assertion could not be revealed—in many instances could not even be summarized—without further jeopardizing national security. Yet as detailed below, in none of these cases did the INS's secret evidence even *allege* that the aliens had engaged in or supported any criminal, much less terrorist, activity. Hany Kiareldeen was the only one accused of even remotely criminal activity, in the form of a vague and unsubstantiated assertion that someone said Kiareldeen said that he thought Attorney General Janet Reno should be killed. That assertion was so unfounded that *every* judge who reviewed the entire file found Kiareldeen not to constitute a threat to national security. In all the other cases in which I've been involved, the government's allegations, once revealed, consisted of no more than guilt by association: the government claimed that the aliens were associated with disfavored "terrorist" groups, but not that they actually engaged in or furthered any terrorist activity themselves.

Most tellingly, all thirteen of these alleged national security threats are now free, from all appearances without any adverse consequences to the security of the nation. Where the cases were resolved in the federal courts, the courts declared the use of secret evidence and charges of guilt by association unconstitutional.<sup>8</sup> Where the cases were resolved in the immigration process, immigration judges uniformly rejected the government's national security claims as unwarranted.<sup>9</sup> And my cases

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Constitutional Rights, Marc Van Der Hout of the National Lawyers Guild, Joseph Hohenstein of the Nationalities Service Center, Paul Hoffman, Carol Sobel, and Mark Rosenbaum of the ACLU of Southern California, Louis Bograd of the ACLU, Randall Marshall and Andrew Kayton of the ACLU Foundation of Florida, James Fennerty, Regis Fernandez, Abdeen Jabara, Kerry Kircher, Ira Kurzban, Michael Maggio, Houeida Saad, Noel Salah, Lawrence Schilling, Martin Schwartz, Lynne Stewart, Dan Stormer, and Len Weinglass.

8. *Rafeedie v. INS*, 795 F. Supp. 13 (D.D.C. 1992) (declaring unconstitutional INS use of secret evidence to expel a permanent resident alien and deportation provisions based on political membership); *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1066, 1070 (9<sup>th</sup> Cir. 1995) (declaring unconstitutional INS use of secret evidence to oppose applications for legalization to permanent resident status); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 414 (D.N.J. 1999) (declaring unconstitutional INS use of secret evidence to detain alien pending deportation proceedings); *Al Najjar v. Reno*, 97 F. Supp. 2d 1329, 1356 (S.D. Fla. 2000) (declaring unconstitutional use of secret evidence to detain alien, and holding that alien may not be detained based on mere association with terrorist group).

9. *Matter of Imad Hamad*, No. A26-590-203 (BIA Feb. 19, 1999) (upholding decision to grant Hamad permanent resident status, rejecting INS claim, based initially on secret evidence, that he was ineligible because of association with a terrorist group); *Matter of Mazen Al Najjar*, No. A26-599-077 (U.S. Immgr. Ct. Dec. 6, 2000) (Dec. of Immgr. J., refusing to consider secret evidence because not presented with adequate procedural safeguards to afford notice and meaningful opportunity to respond); *Matter of Nasser Ahmed*, No. A90-674-238 (U.S. Immgr. Ct. July 30, 1999) (Dec. of Immgr. J., finding no basis to detain Ahmed as threat to national security); *Matter of Hany Kiareldeen*, No. A77-025-332, (U.S. Immgr. Ct. Apr. 2, 1999) (Dec. of Immgr. J.,

are not alone. As detailed below, the INS's increased use of secret evidence has resulted in a remarkable string of losses in the courts and growing criticism from Congress. Moreover, George W. Bush strongly criticized the practice during the 2000 Presidential campaign.<sup>10</sup> But the INS continues to assert the authority to employ such tactics, arguing that neither the Due Process Clause nor the First Amendment constrains its authority to detain aliens on secret evidence for their political associations.<sup>11</sup>

In this essay, I will argue that the use of secret procedures and guilt by association in immigration trials is not only unconstitutional but counterproductive. I will begin with a case study, then discuss in turn the practices of secret evidence and guilt by association, and finally conclude with a consideration of how these two tactics perpetuate invidious stereotypes about Arabs and Muslims.

### I. A CASE STUDY

The details of Hany Kiareldeen's case illustrate as well as any what is wrong with secret evidence. Kiareldeen came to the United States on a student visa in 1990 and lives in Newark, New Jersey. In 1997, he applied for adjustment of status to permanent resident based on his marriage to a United States citizen. On March 26, 1998, however, without ruling on his permanent resident application, the INS arrested Kiareldeen, charged him with being deportable for failing to maintain his student visa status, and took him into custody as a threat to national security.

Kiareldeen has never seen the only evidence that the INS ever offered to justify his detention because the INS presented it to an immigration judge *in camera* and *ex parte*. According to the undisputed claims of the immigration judges who ultimately reviewed it, however, the secret evidence in Kiareldeen's case consisted of a report prepared by an FBI Joint Terrorism Task Force relaying extremely general hearsay allegations. The INS ultimately provided declassified summaries of the classified evidence that disclosed three allegations: (1) that Kiareldeen was associated with an unidentified "terrorist organization," and "maintains relationships" with other members and

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finding no basis to detain Kiareldeen as threat to national security).

10. See 2<sup>nd</sup> Presidential Debate Between Gov. Bush and Vice President Gore (Transcript of Oct. 11, 2000 Presidential Debate), N.Y. Times A23 (Oct. 12, 2000) (Bush criticizes use of secret evidence).

11. Respts/Appellants' Br. 17, *Al-Najjar v. Ashcroft*, No. 00-14947-B (pending 11<sup>th</sup> Cir. 2001).

“suspected members” of “terrorist organizations,” also unidentified; (2) that “[an unidentified] source advised” that about a week before the World Trade Center (“WTC”) bombing, Kiareldeen hosted a meeting at his residence in Nutley, New Jersey, where some individuals discussed plans to bomb the World Trade Center; and (3) that “[an unidentified] source advised Kiareldeen expressed a desire to murder Attorney General Janet Reno.”<sup>12</sup> The INS never introduced any evidence in open court to substantiate any of these allegations.<sup>13</sup>

The immigration judge handling Kiareldeen’s case initially ruled, in April 1998, that the government’s secret evidence justified his detention as a security threat.<sup>14</sup> At that time, the INS told Kiareldeen only that the evidence showed that he was associated with terrorists and posed a threat to the Attorney General, charges so general that he could not possibly rebut them.<sup>15</sup>

After Kiareldeen obtained more detailed summaries of the evidence, he did rebut the government’s case in open court. He proved, for example, that he did not even live in the apartment where he supposedly hosted a meeting with World Trade Center bombers until a year and a half *after* the alleged meeting took place.<sup>16</sup> He showed that his phone records from the time revealed no phone calls to other conspirators in the World Trade Center case, while the conspirators’ phone records showed extensive calls among themselves.<sup>17</sup> And he testified without contradiction that one of the sources of secret evidence against him, his ex-wife, had made numerous false allegations against him in the course of a custody battle over their child.<sup>18</sup> Kiareldeen sought to examine his ex-wife in open court, but the INS vigorously opposed his attempts to do so, and she refused to testify about her discussions with the FBI.<sup>19</sup>

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12. *Kiareldeen v. Reno*, 71 F.Supp. 2d at 416; Verified Petition for Habeas Corpus Relief Ex. E, pp. 2-3, *Kiareldeen v. Reno*, No. 99-3925 (D.N.J. filed Aug. 19, 1999).

13. *Id.* at 417-418.

14. See Verified Petition for Habeas Corpus Relief ¶16, *Kiareldeen v. Reno*, No. 99-3925 (D.N.J. filed Aug. 19, 1999).

15. See *Id.* at ¶16-17, & Attachment A (reproducing INS summary provided at initial bond redetermination hearing).

16. *Matter of Kiareldeen*, No. A77-025-332, slip op. at 13-14 (U.S. Immgr. Ct. Apr. 2, 1999) (Dec. of Immgr. J.).

17. *Id.* at 14-15.

18. *Id.* at 8-9.

19. See *Kiareldeen v. Reno*, 71 F.Supp.2d at 417; Verified Petition for Habeas Corpus Relief ¶22-26, *Kiareldeen v. Reno*, No. 99-3925 (D.N.J. filed Aug. 19, 1999) & Attachment F (reproducing Decision of Immigration Judge in *Matter of Kiareldeen*, No. A77-025-332, slip op. 2-3 (Apr. 2, 1999)).

In the end, seven immigration judges examined the complete record in Kiarldeen's case, including the government's secret evidence presentation and Kiarldeen's open court rebuttal: the judge who conducted the immigration hearing and two separate three-judge panels of the Board of Immigration Appeals.<sup>20</sup> It is rare for any judge—even an independent Article III judge—to reject a claim of national security by the federal government. Yet all seven immigration judges in Kiarldeen's case rejected the government's contention that he posed a threat to national security.<sup>21</sup>

Although the judges were not allowed to reveal the substance of the confidential information, two judges directly discussed the quality of the government's secret evidence. Immigration Judge Daniel Meisner, who presided at his trial, stated that Kiarldeen had "raised formidable doubts about the veracity of the allegations contained in the [classified information]," and that in the face of repeated requests for more information, the INS had refused "to answer those doubts with any additional evidence, be it at the public portion of the hearing or even *in camera*."<sup>22</sup> He concluded that the classified evidence was "too meager to provide reasonable grounds to believe that [Kiarldeen] was actually involved in any terrorist activity."<sup>23</sup>

BIA Judge Anthony Moscato, dissenting from a preliminary bond panel decision not to release Kiarldeen, wrote that the bare-bones character of the government's *in camera* evidence made it "impossible" for the BIA to exercise independent judgment in assessing "either the absolute truth or the relative probity of the evidence contained in the classified information."<sup>24</sup> Judge Moscato criticized the INS for having provided no original source material and "little in the way of specifics regarding the source or context of the classified information."<sup>25</sup> He further noted that despite the immigration judge's continuing requests, the INS had provided "no witnesses, neither confidential informant nor federal agent, to explain or document the context of the actions and statements referenced in the classified information or to document the

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20. See *Matter of Kiarldeen*, No. A77-025-332 (U.S. Immgr. Ct. Apr. 2, 1999) (Dec. of Immgr. J.); *Matter of Kiarldeen*, No. A77-025-332, (BIA Oct. 20, 1999) (Dec. on Bond Redetermination); *Matter of Kiarldeen*, No. A77-025-332 (BIA Oct. 15, 1999) (Dec. on Deportation Proceeding App).

21. *Id.*

22. *Matter of Kiarldeen*, A77-025-332, slip op. 15 (U.S. Immgr. Ct. Apr. 2, 1999) (Dec. of Immgr. J.).

23. *Id.* at 12.

24. *Matter of Kiarldeen*, No. A77-025-332, slip dissent 1 (BIA June 29, 1999) (Moscato, J., dissenting to Dec. Denying Request to Lift Stay of Release Order).

25. *Id.*



way in which the classified information became known to the source of that information.”<sup>26</sup>

On August 19, 1999, Kiareldeen filed a habeas corpus petition in federal district court in New Jersey, arguing that the use of secret evidence concerning his political associations to deprive him of his liberty was both unauthorized by statute and unconstitutional. On October 20, 1999, the district court granted the petition and issued a writ of habeas corpus. The court ruled that the INS’s reliance on secret evidence violated Kiareldeen’s due process right to a fair hearing, finding that “reliance on secret evidence raises serious issues about the integrity of the adversarial process, the impossibility of self-defense against undisclosed charges, and the reliability of government processes initiated and prosecuted in darkness.”<sup>27</sup> The court ordered Kiareldeen’s immediate release.

Later the same day, a three-judge bond panel of the BIA also ordered Kiareldeen’s release, unanimously rejecting the INS’s appeal of the immigration judge’s decision to grant bond, and lifting its prior preliminary stay of Kiareldeen’s release.<sup>28</sup> Five days earlier, on October 15, 1999, a separate three-judge BIA merits panel had unanimously affirmed the immigration judge’s decision granting Kiareldeen permanent resident status, also finding that Kiareldeen had successfully rebutted the INS’s charges against him.<sup>29</sup>

On October 25, 1999, the INS abandoned any further appeals and released Kiareldeen. It apparently concluded, after vigorously contending for more than a year and one-half that Kiareldeen posed a direct threat to our national security, that he did not even pose a serious enough threat to justify pursuing its available appeals. Kiareldeen is now a permanent resident alien.

Hany Kiareldeen’s case is unfortunately not an isolated incident. One month after he was released, the INS also released Nasser Ahmed, an Egyptian who had been detained for over three and one-half years in New York based on secret evidence, most of the time in solitary

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26. *Id.* at 1-2. The other two judges on this panel declined to lift the stay of Kiareldeen’s release order pending appeal, but did not dispute Judge Moscato’s characterization of the evidence.

27. *Kiareldeen v. Reno*, 71 F.Supp.2d at 413.

28. *Matter of Kiareldeen*, No. A77-025-332 (BIA, Oct. 20, 1999) (Dec. on Bond Redetermination).

29. *Matter of Kiareldeen*, No. A77-025-332 (BIA Oct. 15, 1999) (Dec. on Deportation Proceeding App.). Under the BIA’s rules, separate panels consider appeals of bond determinations and appeals of the merits of deportation proceedings. 8 C.F.R. § 3.19(d) (2000). See *Gornika v. INS*, 681 F.2d 501, 505 (7<sup>th</sup> Cir. 1982). See generally 8 U.S.C. § 1226 (2000).

confinement. At the outset of his detention, INS officials took the position that the secret evidence used against Ahmed could not even be summarized. As a result, he was told nothing about the government's evidence against him, could not refute what he could not see, and was detained as a national security threat. After Ahmed filed a constitutional challenge to its tactics, the INS declassified approximately 50 pages of previously secret evidence, and Ahmed was able to rebut the government's charges against him.<sup>30</sup> The same judge who had previously found Ahmed a national security threat reversed himself after hearing Ahmed's side of the story.<sup>31</sup>

Much of the evidence declassified in Ahmed's case should never have been classified in the first place.<sup>32</sup> One initially classified allegation, for example, maintained that Ahmed was associated with Sheikh Omar Abdel Rahman, who was convicted for plotting to bomb tunnels and buildings around Manhattan.<sup>33</sup> But Ahmed's association with Sheikh Abdel Rahman was no secret, as Ahmed had served as the Sheikh's court-appointed paralegal and translator during the Sheikh's criminal trial. Other declassified evidence revealed that the INS's witness in the *in camera* proceedings, an FBI agent, had argued that Ahmed should be detained because his detention by INS had made him a hero in the Muslim community and his release would increase his political stature.<sup>34</sup> While one might understand why the government would want to keep secret the fact that it had made such a circular and unconstitutional contention, the evidence hardly merited classification as a secret whose disclosure would imperil national security. In the end, the immigration judge ruled that the INS's evidence did not establish any threat to national security, the Board of Immigration Appeals

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30. See Declassified excerpts of previously classified evidence Ex. R-1, R-2, R-4 (Sept. 25, 1998 & Nov. 27, 1998), *Matter of Ahmed*, A90-674-238 (U.S. Immgr. Ct.) (Remanded Bond Redetermination Proceeding).

31. *Matter of Ahmed*, A90-674-28 (U.S. Immgr. Ct. July 30, 1999) (Dec. of Immgr. J.) and Declassified Version of Classified Attachment (June 24, 1999). See also David Cole, *Terrorist Scare*, *The Nation* 26 (Apr. 19, 1999).

32. Information may be classified only if its disclosure could reasonably be expected to damage the national security or the government's international relations. Exec. Or. 12958, 60 Fed. Reg. 19825, 19826 (1995).

33. See Unclassified Summary of Classified Material Previously Provided to IJ and BIA, filed as Ex. 1 to Reply Declaration of Daniel S. Alter in *Ahmed v. Reno*, 97 Civ. 68729 (TPG) (asserting that Ahmed is "a loyal supporter of Sheik Omar Abdel Rahman" and that Ahmed "maintained a close personal and professional association with RAHMAN both during RAHMAN's trial and after his conviction," and "served as one of RAHMAN's paralegals").

34. Declassified Version of Classified Attachment to Dec. of Immgr. J. 8-9, *Matter of Ahmed*, No. A90-674-28 (June 24, 1999); Benjamin Weiser, *F.B.I. Said Freeing Prisoner Would Aid Arab Status*, *N.Y. Times* B1 (Nov. 11, 1999).

affirmed, and the Attorney General declined to intervene.

In August 2000, Dr. Ali Yasin Mohammed Karim was released, but again only after spending several years in custody based on secret evidence. In 1997, the INS relied on secret evidence to detain and deny entry to Dr. Karim and several other Iraqis who were accused of being double-agents when the United States airlifted them from Iraq after they participated in an unsuccessful CIA-backed coup attempt against Saddam Hussein. When former Director of Central Intelligence James Woolsey took on their case and brought substantial congressional and media pressure to bear on the INS, the government declassified over 500 pages of the previously secret evidence.<sup>35</sup> On the basis of that disclosure, Dr. Karim was able to rebut the government's charges, and is today a free man.<sup>36</sup>

In December 2000, the INS released Mazen Al Najjar, a Palestinian, but not before he spent three years and seven months behind bars based on secret evidence. The government accused Al Najjar, an adjunct professor at the University of South Florida, President of a Tampa private school, and a leader in his mosque, of being associated with the Palestine Islamic Jihad. But it did so initially solely on the basis of secret evidence. The government said it could not make any of the details of its allegations public, so Al Najjar, who denied being associated with the group, was left with no idea of what he was alleged to have done with the group, when he was alleged to have been associated, or who made these allegations and on what basis.<sup>37</sup> When a federal court ruled that his detention based on secret evidence violated due process,<sup>38</sup> the INS once again sought to prove that Al Najjar should be detained as a security threat. After a two-week public hearing and the presentation of secret evidence, the immigration judge ruled that the INS had failed to make its case, and ordered Al Najjar released.<sup>39</sup> The Board of Immigration Appeals refused to stay the release, as did the Attorney General, and Al Najjar was released, 1307 days after he was locked up.<sup>40</sup>

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35. Andrew Cockburn, *The Radicalization of James Woolsey*, N.Y. Times Magazine 26 (July 23, 2000).

36. Dan Weikel, *INS Judge Frees Iraqi Dissident Held for 4 Years*, L.A. Times, B1, B5 (Aug. 19, 2000); Tim Weiner, *At Rehearing, Iraqi Doctor Wins Round in Deportation*, N.Y. Times, A19 (May 7, 2000).

37. *Al Najjar v. Reno*, 97 F.Supp.2d at 1333-1334.

38. *Id.* at 1356-1357.

39. *Matter of Al-Najjar*, No. A-26-599-077 (U.S. Immgr. Ct. Oct. 27, 2000 & Dec. 6, 2000) (Decisions of Immgr. J. on Remanded Bond Redetermination).

40. Christopher Marquis, *U.S. to Free Palestinian Held 3 Years on Secret Evidence*, N.Y. Times A12 (Dec. 16, 2000).

## II. SECRET EVIDENCE AND DUE PROCESS

These and other cases illustrate why adjudications of human liberty should never be based on undisclosed evidence, and why every federal court to address the INS's use of secret evidence since the advent of modern due process jurisprudence has declared the practice unconstitutional. It is simply not possible to conduct a fair adversary proceeding where one side presents its evidence behind closed doors, immune from testing by its adversary. At its core, the adversary process depends on each side's ability to examine and respond to the other's evidence. When Nasser Ahmed was required to defend himself against secret evidence about which the government told him not a word, he was understandably unable to mount a defense. Yet when declassification permitted him to respond to the allegations against him, he was able to convince a judge to reverse himself. As the Supreme Court has said, "[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights."<sup>41</sup> One cannot defend against what one cannot see.

INS rules impose virtually no safeguards on the use of secret evidence. If it can do so without jeopardizing classified information or sources, the INS is supposed to provide the alien with an unclassified summary of the classified evidence; but the law does not *require* provision of such a summary, nor does it require that the summary meet any standard of adequacy.<sup>42</sup> Such summaries may consist of a single sentence. At one point in Ahmed's case, for example, he was given a summary that said only that he had an "association with a known terrorist organization."<sup>43</sup> The INS would not even reveal the name of the group, much less when Ahmed was alleged to have been associated, how he was allegedly associated, and what, if anything, he was alleged to have done for the group. The immigration judge characterized the summary as "largely useless," but INS regulations did not require anything more helpful.<sup>44</sup>

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41. *Goss v. Lopez*, 419 U.S. 565, 580 (1975) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J. concurring)).

42. See, e.g., 8 C.F.R. §240.11(c)(3)(iv) (2001) (providing that the classifying agency "may provide an unclassified summary of the information for release to the alien, whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its sources") (emphasis added).

43. *Matter of Ahmed*, No. A90-674-228, slip op. 20 (U.S. Immgr. Ct. May 5, 1997) (Decision of Immigration Judge).

44. *Id.*; see also David Cole, *Blind Decisions Come to Court*, *The Nation* 21, 22 (June 16, 1997).

Declassified summaries of secret evidence that has been presented behind closed doors will rarely suffice to afford an alien a fair opportunity to defend himself, because one cannot cross-examine a summary. In many instances, the source of an allegation is the most important piece of information necessary to mount a defense, yet in my experience it is often the source that the government seeks to keep confidential. When Hany Kiareldeen surmised that the source in his case might be his ex-wife and subpoenaed her to testify, the INS fought his efforts every step of the way. On the stand, she admitted to having spoken with the FBI, but refused to provide any details, and the INS objected to any questioning along those lines.<sup>45</sup>

Attorneys who know that their evidence cannot be challenged by their adversaries have less incentive to test their sources to determine whether they have the truth, as the allegations will not be subjected to testing in court. In its *in camera* presentations, the INS has often relied on double and triple hearsay assertions by FBI agents, and has refused to produce original declarants even when asked to do so by the immigration judge in the closed-door proceedings.<sup>46</sup> As noted above, one judge in the Kiareldeen case complained that the secret evidence consisted of no more than bare-bones assertions, and did not even provide the judge with sufficient information to make an independent assessment of the reliability of or basis for the allegations.<sup>47</sup>

These features of the INS's reliance on secret evidence have led virtually every court that has addressed the practice since the advent of modern due process jurisprudence to declare it unconstitutional.<sup>48</sup> There is a simple reason for this. At bottom, secret evidence denies an alien the most basic guarantees of due process: notice of the evidence against

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45. See *Kiareldeen v. Reno*, 71 F.Supp.2d at 417; Verified Petition for Habeas Corpus Relief ¶¶ 23-24, *Kiareldeen v. Reno*, No. 99-3925 (D.N.J. filed Aug. 19, 1999).

46. *Matter of Kiareldeen*, A77-025-332, slip op. 15-16 (U.S. Immgr. Ct. Apr. 2, 1999) (Decision of Immigration Judge); Declassified Version of Classified Attachment to Decision of Immigration Judge 10-11, *Matter of Ahmed*, A90-674-238 (U.S. Immgr. Ct. June 24, 1999).

47. *Matter of Kiareldeen*, A77-025-332, slip dissent 1-2 (BIA June 29, 1999) (Moscato, J., dissenting) (Decision Denying Request to Lift Stay of Release Order).

48. *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1070 (9<sup>th</sup> Cir. 1995) [hereinafter *ADC v. Reno*]; *Rafeedie v. INS*, 880 F.2d 506 512-513, 516 (D.C. Cir. 1989); *Al Najjar v. Reno*, 97 F.Supp.2d at 1356; *Kiareldeen v. Reno*, 71 F.Supp.2d 402; but cf. *Suciu v. INS*, 755 F.2d 127, 128 (8<sup>th</sup> Cir. 1985) (holding, without analysis, that use of secret evidence is consistent with due process).

As explained below, modern procedural due process jurisprudence begins with *Mathews v. Eldridge*, 424 U.S. 319, 335, 343-349 (1976), in which the Supreme Court defined the test that must be applied in assessing whether procedures used to deprive a person of a liberty interest conform to procedural due process.

him and a meaningful opportunity to rebut it.<sup>49</sup>

As the Supreme Court has stated:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.<sup>50</sup>

A brief review of the federal court decisions addressing the INS's use of secret evidence illustrates this principle.

In 1988, the INS sought to rely on secret evidence of Fouad Rafeedie's alleged high-ranking membership in the Popular Front for the Liberation of Palestine (PFLP), an allegedly terrorist group, to exclude him from the country upon his return from a trip abroad. A district court preliminarily enjoined the INS's actions on due process grounds, and the D.C. Circuit affirmed the injunction.<sup>51</sup> On remand, the district court granted summary judgment and held that the INS's attempt to rely on secret evidence violated due process.<sup>52</sup> The INS chose not to appeal, abandoned its effort to expel Rafeedie, and allowed him to remain a permanent resident of the United States.

In *Rafeedie*, every judge to review the INS's actions found "the government's basic position . . . profoundly troubling."<sup>53</sup> The district court found that such a procedure "afford[s] virtually none of the procedural protections designed to minimize the risk that the government may err."<sup>54</sup> The court of appeals compared the position of

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49. The Due Process Clause protects all persons living in this country, whether citizen or alien. It protects even aliens living here unlawfully:

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. *Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.*

*Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (emphasis added) (citations omitted). See also *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) ("our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality."); *Galvan v. Press*, 347 U.S. 522, 530 (1954) ("since he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded a citizen.").

50. *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

51. *Rafeedie v. INS*, 688 F. Supp. 729 (D.D.C. 1988), *aff'd in part, rev'd in part, and remanded*, 880 F.2d 506 (D.C. Cir. 1989).

52. *Rafeedie v. INS*, 795 F. Supp. 13, 23-24 (D.D.C. 1992).

53. *Rafeedie*, 880 F.2d at 525 (Ruth Bader Ginsburg, J., concurring) (quoting Silberman, J., dissenting, *Id.* at 530).

54. *Rafeedie*, 795 F. Supp. at 19.

an alien having to disprove charges based on secret information to that of Joseph K. in Franz Kafka's *The Trial*, and stated that "[i]t is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden."<sup>55</sup>

In 1995, the Ninth Circuit unanimously held that the INS could not constitutionally rely on undisclosed information to deny legalization, an immigration benefit, to two aliens accused of associating with a terrorist organization.<sup>56</sup> The Ninth Circuit held that "[o]nly the most extraordinary circumstances could support one-sided process."<sup>57</sup> The fact that the government asserted national security and charged the aliens with membership in a terrorist organization was not sufficient to justify reliance on secret evidence.<sup>58</sup> Again, the government chose not to pursue further appeals, and granted the aliens legalization, which allowed them to become permanent residents of the United States.

In 1999, the district court in *Kiareldeen* applied the same principles to hold that detaining an alien on the basis of secret evidence violates due process. Once again, the government chose not to appeal. And in May 2000, a district court in Miami held that the use of secret evidence to detain Mazen Al Najjar violated his due process rights by depriving him of notice and a meaningful opportunity to defend himself. While the government had appealed the district court's decision in Al Najjar's case, its own immigration judges on remand ruled that the INS had failed to show that Al Najjar should be detained as a national security threat, and the Attorney General rejected the INS's request to authorize his continued detention.<sup>59</sup>

These decisions, in turn, followed *Kwong Hai Chew v. Colding*,<sup>60</sup> in which the Supreme Court in 1953 relied on due process concerns to interpret an INS regulation not to permit the use of secret evidence to expel aliens who live here and have due process protections. Chew was a lawful permanent resident of the United States who had left the country for four months as a seaman on a merchant vessel. Upon his return, he was threatened with permanent exclusion based on an immigration regulation that allowed the exclusion of aliens on the basis of confidential information without a hearing. To avoid a "constitutional conflict" with the Due Process Clause, the Supreme

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55. *Rafeedie*, 880 F.2d at 516.

56. *ADC v. Reno*, 70 F.3d at 1066-1071.

57. *Id.* at 1070.

58. *Id.*

59. *Marquis*, *supra* n. 40.

60. 344 U.S. 590 (1953).

Court construed the regulation not to apply to returning lawful resident aliens.<sup>61</sup>

These cases establish a simple proposition: the use of secret evidence cannot be squared with due process because it defeats the adversary process. Ordinarily, aliens have a right to confront all the evidence against them, and to cross-examine the government's witnesses. In secret evidence proceedings, the alien cannot cross-examine, and often has no idea of the content of the charges against him. Ordinarily, aliens can object to the introduction of evidence in immigration proceedings; but, where evidence is produced in secret, the alien cannot make any objections because he cannot know what the evidence consists of. Ordinarily, an alien is provided with notice of the charges against him; in a secret evidence proceeding he often has no notice, and must defend himself in the dark. In short, all of the requisites of a fair adversarial process are abandoned when the government introduces its evidence behind closed doors.

Defenders of the practice of secret evidence generally point to *Jay v. Boyd*,<sup>62</sup> a Supreme Court decision upholding the use of secret evidence to deny an alien "suspension of deportation," a benefit that the Court in *Jay* characterized as akin to a pardon, "a matter of grace." *Jay* is of limited utility for defenders of secret evidence, however, for it expressly disclaimed any constitutional holding. The case presented only a statutory challenge to the use of secret evidence, and the Court noted that the alien had presented no constitutional challenge.<sup>63</sup> While the Court went on in *dicta* to state that it was not in any event troubled by the constitutional implications, a case that does not even present a constitutional claim cannot resolve that claim.

Moreover, *Jay* appears to be premised on the notion that suspension was wholly a "matter of grace." Yet the INS claims authority to rely on secret evidence not only to deny wholly discretionary benefits, but also to deport "terrorist aliens"; to deny non-discretionary benefits, such as withholding of deportation; and to detain aliens while they are in deportation proceedings.<sup>64</sup> In detention cases,

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61. *Id.* at 600-603.

62. 351 U.S. 345, 347, 354 (1956).

63. *Jay*, 351 U.S. at 357 n.21.

64. 8 U.S.C. §§ 1531-1537 (2000) (authorizing use of secret evidence to deport aliens accused of terrorist activity or ties); *ADC v. Reno*, 70 F.3d at 1066-1071 (rejecting government's argument that it could constitutionally deny legalization, a nondiscretionary benefit, on the basis of secret evidence); *Al Najjar v. Reno*, 97 F.Supp.2d at 1349-51 (rejecting government argument that because release on bond is discretionary, aliens have no liberty interest in being free while their deportation proceedings are pending, so can be detained on secret evidence); Memorandum



the government has argued that because the immigration statute gives the Attorney General discretion to release or detain an alien in deportation proceedings, release on bond is a "discretionary benefit"; therefore, it triggers no entitlement to liberty and no due process protection.<sup>65</sup> But where the government seeks to physically restrain a human being, the Constitution itself recognizes a liberty interest that triggers due process protections, so aliens need not rely on a statutory entitlement.<sup>66</sup> If the constitutionally-based interest in physical liberty could be defeated simply by enactment of a statute granting executive officials discretion to detain, liberty would exist only at the deference of the legislature.<sup>67</sup>

Of equal importance, *Jay v. Boyd* preceded *Mathews v. Eldridge*,<sup>68</sup> a 1976 decision that established modern due process standards. In *Mathews*, the Supreme Court announced that in order to assess whether procedures for depriving a person of liberty, property, or life satisfy due process, courts must balance three interests: the individual's interest at stake; the risk of error from the procedures employed; and the government's interest in avoiding more extensive procedures. The Court subsequently ruled that this balancing test governs the procedural adequacy of immigration procedures.<sup>69</sup> The Supreme Court's decision in *Jay v. Boyd*, not surprisingly, did not undertake the analysis now required by *Mathews*. In every case that has applied the *Mathews* test to the INS's use of secret evidence, the courts have held the practice unconstitutional.

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in Support of Motion to Dismiss, *Ahmed v. Reno*, 97 Civ. 6829 (TPG) (arguing that INS may use secret evidence to deny withholding of deportation, a nondiscretionary benefit).

65. See, e.g., Respts/Appellants' Br. 17, *Al Najjar v. Ashcroft*, No. 00-14947-B (11<sup>th</sup> Cir. filed Nov. 8, 2000) (pending).

66. *Reno v. Flores*, 507 U.S. 292, 315 (1993) (O'Connor, J., concurring) (aliens have "a constitutionally protected interest" and "[t]hat interest lies within the core of the Due Process Clause"); *Foucha v. La.*, 504 U.S. 71, 80 (1992) ("commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception").

67. Proponents of secret evidence also cite two other cases, from the Fifth and Eighth Circuits, but neither decision engaged in any significant constitutional analysis. They each dismissed the due process issue in a paragraph by misreading *Jay v. Boyd* as if it decided the constitutional issue, wholly disregarding the fact that the Court in *Jay* explicitly said it was *not* deciding that issue. See *U.S. ex rel. Barbour v. Dist. Dir.*, 491 F.2d 573, 578 (5th Cir.), cert. denied, 419 U.S. 873 (1974); *Suciu v. INS*, 755 F.2d 127, 128 (8th Cir. 1985). Indeed, the court in *Suciu* acknowledged that "[a]s a matter of fairness and logic, the [due process] argument has considerable appeal," but then erroneously considered it "foreclosed" by *Jay v. Boyd*. *Suciu*, 755 F.2d at 128.

68. 424 U.S. 319, 335 (1976).

69. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

Defenders of secret evidence also often argue that aliens are entitled to less “process” than citizens, so that even if such a tactic might not pass muster as applied to citizens, it is permissible with respect to aliens. In hearings before the House Immigration Subcommittee in February 2000, for example, the FBI’s Deputy General Counsel argued in defense of the use of secret evidence that while aliens are entitled to due process in immigration proceedings, they are not necessarily entitled to the full panoply of due process rights that citizens must be afforded when their liberty is deprived.<sup>70</sup> No case supports a sliding scale of procedural due process protections turning on whether the person being deprived of his liberty is a citizen or not. But even if there were such a sliding scale, it would not support the use of secret evidence, which deprives its targets not of some sort of *deluxe* procedures but of the most *basic* elements of due process: notice and a meaningful opportunity to defend oneself.

Finally, defenders of the practice argue that the government should not have to make the “Hobson’s choice” of disclosing classified information, and thereby imperiling the national security, or allowing an alien who threatens national security to remain here. But of course the government makes such decisions every day with regard to citizens. In no other setting, civil or criminal, is the government permitted to deprive someone of his liberty without affording him a meaningful opportunity to respond to the evidence against him. In criminal cases, the Confrontation Clause means that the government is *never* permitted to rely on secret evidence, no matter how serious the charges, and no matter how much confidential or classified information the government has implicating the defendant. This rule applies to the prosecution of terrorists, spies, and mass murderers. There is no reason we cannot and should not extend the same rule to immigrants when we seek to deprive them of their liberty and either imprison or deport them.

### III. GUILT BY ASSOCIATION

The substance of the charges leveled by INS in its “terrorist” removal cases raises independent constitutional concerns because in nearly every case the government seeks to hold individuals accountable not for their individual conduct, but for their associations. The cases, almost by definition, involve persons as to whom the government lacks evidence of criminal conduct. Where the government has evidence that an individual has engaged in criminal or terrorist conduct, it is generally

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70. Testimony of Larry Parkinson, *supra* n. 3, at 36.

not satisfied to remove him from the United States, but seeks affirmatively to convict and detain him. We would hardly be satisfied to send an actual terrorist abroad, where he would be free to plan further attacks. Thus, the immigration process is customarily invoked in "terrorism" cases where there is no evidence of terrorist or even criminal conduct on the part of the targeted alien. In the absence of such evidence, the government generally relies on some version of guilt by association, arguing that the individual is dangerous not for what he did or plans to do, but because he is associated with a group that has engaged in terrorism. That approach violates the First and Fifth Amendments' prohibition on guilt by association.<sup>71</sup>

The constitutional prohibition on guilt by association developed in response to McCarthy era laws that penalized association with the Communist Party. In enacting those laws, Congress specifically found that the Communist Party was engaged in terrorism and sabotage for the purpose of overthrowing the United States,<sup>72</sup> and as a result sought to penalize all association with the Party. Yet the Supreme Court repeatedly held that individuals could not constitutionally be penalized for their Communist Party associations absent proof that they specifically intended to further the group's illegal ends.<sup>73</sup> The Court's application of the "guilt by association" principle was not limited to criminal culpability, but extended to programs that merely denied various benefits to persons based on their associations.<sup>74</sup>

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71. For an expanded discussion of the First and Fifth Amendment implications of targeting aliens (and citizens) for their associational activities, see David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 Sup. Ct. Rev. 203 (2000).

72. 50 U.S.C. § 781 (West 1991) (repealed 1993).

73. See, e.g., *U.S. v. Robel*, 389 U.S. 258, 262 (1967) (government could not ban Communist Party members from working in defense facilities absent proof that they had specific intent to further the Party's unlawful ends); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 606 (1967) ("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) ("[a] law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); *Noto v. U.S.*, 367 U.S. 290, 299-300 (1961) (First Amendment bars punishment of "one in sympathy with the legitimate aims of [the Communist Party], but not specifically intending to accomplish them by resort to violence").

74. *Robel*, 389 U.S. at 264-266 (invalidating denial of security clearance to work in national defense facility based on Communist Party membership); *Aptheker v. Sec. of St.*, 378 U.S. 500, 510-512 (1964) (invalidating denial of passport based on Communist Party membership); *Keyishian*, 385 U.S. at 606-608 (invalidating bar on employment as teacher based on Communist Party membership); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920, 932 (1982) (invalidating civil tort liability based on association); *Healy v. James*, 408 U.S. 169 (1972) (invalidating denial of access to college meeting rooms to student group based on association).

As the Supreme Court explained in *Scales v. United States*:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . , that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.<sup>75</sup>

In addition, guilt by association violates the First Amendment, because a "blanket prohibition of association with a group having both legal and illegal aims . . . would . . . [pose] a real danger that legitimate political expression or association would be impaired."<sup>76</sup> For both reasons, the Constitution requires proof that the individual "specifically intend[ed] to accomplish [the aims of the organization] by resort to violence."<sup>77</sup> As the Supreme Court has said, "[a] law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms" and relies on "'guilt by association,' which has no place here."<sup>78</sup>

These principles ought to apply equally to aliens and citizens, for neither the First nor the Fifth Amendments' protections are limited to citizens.<sup>79</sup> Indeed, the Supreme Court has held that because the First Amendment is designed to foster a robust public debate, it protects the speech even of corporations, not because the corporations themselves have rights, but because allowing the government to silence corporations would undermine the rights of persons in the United States to hear their views.<sup>80</sup> Noncitizens contribute to the public debate at least as much as

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75. 367 U.S. 203, 224-225 (1961).

76. *Id.* at 229.

77. *Id.* (quoting *Noto v. U.S.*, 367 U.S. 290, 299 (1961)).

78. *Elfbrandt v. Russell*, 384 U.S. at 19 (citations omitted).

79. The First Amendment does not "acknowledge[] any distinction between citizens and resident aliens." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)). See also *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("resident aliens have First Amendment rights"); cases cited *supra* n. 49 (holding that due process applies to aliens living in the United States). In *Bridges v. Wixon*, 326 U.S. at 148, the Court reversed a deportation order based on association with the Communist Party, stating that "[f]reedom of speech . . . is accorded aliens residing in this country." And, in *Harisiades v. Shaughnessy*, 342 U.S. 580, 592 (1952), the Court upheld the deportation of a Communist Party member only after finding that the government's evidence satisfied the then-prevailing First Amendment standard for citizens, set forth in *Dennis v. U.S.*, 341 U.S. 494 (1951). In doing so, the Court implicitly declined to adopt the government's argument that the First Amendment "do[es] not apply to the political decision of Congress to expel a class of aliens whom it deems undesirable residents." *Harisiades*, 96 L.Ed. at 593, 592-594 (quoting Brief for Respondent United States at 95-96).

80. *First Natl. Bank v. Bellotti*, 435 U.S. 765 (1978).

corporations, and for that reason alone warrant First Amendment protection.

Yet in none of the “terrorist” immigration cases has the government alleged the intent to further illegal ends required by the First and Fifth Amendments. In a longstanding case against seven Palestinians and a Kenyan in Los Angeles accused of being associated with the Popular Front for the Liberation of Palestine (PFLP), for example, the FBI Director testified in Congress that an FBI investigation had found no evidence of criminal or terrorist activity, that plaintiffs “were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation,” and that “if these individuals had been United States citizens, there would not have been a basis for their arrest.”<sup>81</sup> The INS District Director who authorized the deportation proceedings confirmed the charge, admitting that plaintiffs “were singled out for deportation because of their alleged political affiliations with the [PFLP].”<sup>82</sup> He stated that the INS sought plaintiffs’ deportation “at the behest of the FBI, which concluded after investigating plaintiffs that it had no basis for prosecuting plaintiffs criminally, and urged the INS to seek their deportation.”<sup>83</sup>

Contemporaneous FBI memoranda that were prepared to urge the INS to deport the eight aliens also confirm that the aliens were targeted solely for lawful political associations and advocacy. The documents consist entirely of accounts of lawful political activity, and they include detailed reports on political demonstrations, meetings, and dinners, and extensive quotations from political speeches and leaflets. Over 300 pages are devoted to tracking plaintiffs’ distribution of PFLP newspapers that are available in public libraries throughout the United States. The memos repeatedly criticize plaintiffs’ political views as “anti-US, anti-Israel, anti-Jordan,”<sup>84</sup> and even “anti-REAGAN and anti-MABARAK [sic].”<sup>85</sup> The principal FBI report on the group states that its purpose is “to identify key PFLP people in Southern California sufficiently enough so that law enforcement agencies capable of disrupting the PFLP’s activities through legal action can do so,” and

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81. *ADC v. Reno*, 70 F.3d at 1053 (quoting Hearings before the Senate Select Committee on Intelligence on the Nomination of William H. Webster, to be Director of Central Intelligence, 100th Cong., 1st Sess. 94, 95 (Apr. 8, 9, 30, 1987; May 1, 1987)).

82. Joint Appendix 93 (Declaration of INS Dist. Dir. Ernest Gustafson), *Reno v. Am.-Arab Anti-Discrimination Comm.*, 118 S.Ct. 2059 (1998).

83. *Id.* at 94.

84. *Id.* at 150-151, 172-174, 181, 184, 190-191.

85. *Id.* at 165.

specifically urges deportation of the alleged "leader" of the group, Khader Hamide, not because he engaged in any criminal acts, but because he is "intelligent, aggressive, dedicated, and shows great leadership ability."<sup>86</sup>

In other cases, the government has similarly relied on theories of guilt by association. As noted above, one of the charges against Kiareldeen was that he "associated" with other terrorists and suspected terrorists. Similarly, Nasser Ahmed was said to be a threat to national security in part because he was allegedly associated with Sheikh Omar Abdel Rahman and an Egyptian Islamic movement that the INS characterized as a terrorist group.<sup>87</sup> Mazen Al Najjar's detention for over three and one-half years was justified solely by his alleged association with the Palestine Islamic Jihad.<sup>88</sup> And the INS sought to deny permanent resident status to Imad Hamad, a Palestinian living in Dearborn, Michigan, based on his alleged association with the PFLP.<sup>89</sup>

There is a troubling congruence between the procedural tactic of relying on secret evidence and the substantive theory of guilt by association. It is almost as if the government uses secret evidence in part to obfuscate the fact that its theory of liability is guilt by association. In any event, guilt by association has been at the root of most of the secret evidence cases, and it is only when that fact has been revealed that the aliens have prevailed.

#### IV. CONCLUSION: SECRECY, ASSOCIATION, AND PREJUDICE

Twelve of the thirteen persons I've represented in secret evidence "terrorist" cases have been Arab or Muslim. (The thirteenth is the Kenyan wife of Khader Hamide, the putative leader of the immigrants in Los Angeles accused of ties to the PFLP). In 1998, the Justice Department said that of 24 pending secret evidence cases at that time, all but one or two were against Arabs or Muslims.<sup>90</sup> While there is no evidence that the disparate targeting of Arabs and Muslims is the result

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86. *Id.* at 152, 142-143.

87. *Matter of Ahmed*, A90-674-28, Decision of Immigration Judge (July 30, 1999) and Declassified Version of Classified Attachment (June 24, 1999).

88. *Al Najjar*, 97 F.Supp.2d at 1360.

89. *See Matter of Hamad*, A26-590-203 (BIA Feb. 19, 1999).

90. In a meeting on June 29, 1998 with representatives of several Arab-American groups, including Maya Berry of the Arab American Institute, Deputy Attorney General Eric Holder told the group that of 24 pending secret evidence cases, all but one or two were against Arabs or Muslims. Conversation with Maya Berry. *See also* Ann Scott Tyson, *Courts and Lawmakers are Closely Scrutinizing Practice of Detaining Immigrants Without Telling Them Why*, Christian Sci. Monitor 3 (June 2, 2000) (reporting that "about 50 [secret evidence] cases were filed between 1992 and 1998, lawmakers say, the majority involving Arab or Islamic immigrants").

of direct animus, the figures are nonetheless troubling. One cannot help but wonder, for example, whether the INS is not affected by the realization that if it sought to employ such tactics against an immigrant less subject to negative stereotypes—an Irish immigrant who supported the nonviolent activities of the IRA, for example—its actions would prompt a much broader hue and cry. Or could it be that the same stereotypes make the FBI more likely first to investigate and then to ask INS to deport Arab and Muslim political activists? Is it mere coincidence that the INS has never sought to use secret evidence against an Irishman whose only wrong is to be associated with the IRA?<sup>91</sup>

These concerns are amplified when one considers the interrelationship between the government's tactics and the stereotypes and ignorance about Arabs and Muslims that may underlie the disparate pattern of enforcement. Secret procedures allow the government to advance inferences and charges that once challenged in open court are shown to have no basis in fact, but that absent adversarial testing, may seem reasonable. This may explain why so many immigration judges in the secret evidence cases have first found that aliens pose a threat to national security, but have then reversed themselves when the alien has been afforded an opportunity to confront the specific charges against him in open court. In Mazen Al Najjar's case, for example, it became clear that the principal INS investigative agent had equated the term "martyr" with "suicide bomber" and the term "jihad" with "armed struggle," and had assumed that the mere presence of a conference on Middle East developments constituted support for the Palestine Islamic Jihad and its illegal ends.<sup>92</sup> When the government initially presented its evidence in secret, the immigration judge concluded that mere association with the Islamic Jihad was sufficient to establish a threat to national security. Three years later, when he had the opportunity to hear Al Najjar's side of the story and an extensive cross-examination of the government's public record charges, the same judge found that the INS had failed to offer any evidence showing that Al Najjar constituted a threat.<sup>93</sup>

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91. The INS has threatened to use secret evidence in cases against Irish immigrants alleged to have actually engaged in terrorism, but to my knowledge it has never done so in any cases where the charge was mere association, as it is in the bulk of the secret evidence cases against Arabs and Muslims.

92. Bond Proc. Tr. 383-395, 398-400, 442-443, 447-448, *Matter of Al Najjar*, No. A26-599-077 (U.S. Immgr. Ct. Aug. 30, 2000).

93. *Matter of Al Najjar*, A26-599-077 (U.S. Immgr. Ct. Oct. 27, 2000) (Decision of Immigration Judge).

Guilt by association similarly allows the government to rely on inferences and assumptions that are unsupported by fact. Where it seeks to show danger or liability based on association, the government need not show that the individual did anything wrong, or is planning to do anything wrong. It is enough to show that he is associated with the wrong group. But that kind of group-based culpability is exactly what lies at the root of stereotyping and prejudice—it treats people not as individuals in their own right, but as suspect for their group association and identity.

Secret evidence and guilt by association are not only unconstitutional, but counterproductive in the fight against terrorism. Secrecy poisons the truth-finding process, and associational liability allows the government to paint with a broad brush, so that when these tactics are employed we cannot be certain whether we have in fact accurately identified real threats to national security. Both tactics embroil the government in protracted litigation because of the constitutional and fairness concerns they inevitably raise. And most problematically, the use of these tactics, particularly when it appears that they are targeted against particular communities, breeds cynicism, paranoia, and distrust in those communities. Closed-door proceedings and guilt by association principles understandably make people fear the worst from the government. That fear and distrust in turn impede the ability of law enforcement to identify true threats in immigrant communities because many community members will come to view the FBI and INS as enemy rather than protector.

We would do better in the fight against terrorism if we focused our efforts on those who actually engage in or plan terrorist conduct, and if we were willing to subject our enforcement efforts to fair and open procedures. When the fear of terrorism leads our government to sacrifice the very principles on which it was founded, we have already lost. As Chief Justice Earl Warren wrote in declaring unconstitutional a federal law that barred Communists from working in national defense facilities: “It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.”<sup>94</sup>

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94. *Robel*, 389 U.S. at 264.